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Supreme Court, U.S.

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In The
Supreme Court of the United States

OCTOBER TERM, 1970

~~No.~~ 70-50

CONSOLIDATED CITY OF JACKSONVILLE and DUVAL COUNTY, STATE OF FLORIDA,

Petitioner,

v.

JEWEL BERTRAM WOOLEY, JR.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

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CONSOLIDATED CITY OF JACKSONVILLE and DUVAL COUNTY, STATE OF FLORIDA,

Petitioner,

v.

JEWEL BERTRAM WOOLEY, JR.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Consolidated City of Jacksonville and Duval County, State of Florida, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on October 27, 1970.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court for the Middle District of Florida, Jacksonville Division, is reported at 308 F. Supp. 1194 (1970), and is attached to this petition as Appendix "A". The opinion of the Court of Appeals for the Fifth Circuit is not yet officially reported but is unofficially reported as Case Number 29583 in an opinion rendered October 27, 1970, and is attached to this petition as Appendix "B".

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on October 27, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether or Not the Sixth Amendment Right to Court-Appointed Counsel, Applicable to the States Through the Fourteenth Amendment, Extends to a Defendant in a Municipal Court Where the Maximum Potential Penalty Which May Be Imposed as a Result of Convictions on All Then-Pending Charges Totals Ninety Days Confinement or a $500.00 Fine?

Constitutional Provisions, Statutes, and Ordinances Involved

The constitutional provisions involved are the due process clause of the Fourteenth Amendment to the United States Constitution (App. "C"), and the right to counsel clause of the Sixth Amendment to the United States Constitution (App. "D"). The statutory provisions involved are 28 U.S.C. Section 2254 (App. "E"), and Section 944.40, Florida Statutes, 1967, then in effect (App. "F"). The ordinances involved are Section 26-7, Ordinance Code of the City of Jacksonville (App. "G"), and Section 26-52, Ordinance Code of the City of Jacksonville (App. "H").

STATEMENT OF THE CASE

On January 2, 1970, a petition for writ of habeas corpus was filed in the United States District Court for the Middle District of Florida by Jewel Bertram Wooley, Jr., a municipal

prisoner, sentenced to ninety days confinement pursuant to conviction in Municipal Court on pleas of guilty to violations of municipal ordinances prohibiting drunk and disorderly conduct, profane language, and balance due from an escape from a prior commitment which occurred prior to Section 944.40, Florida Statutes, being amended to render escape a felony. Section 944.40, Florida Statutes, *1967*, previously made escape from a misdemeanor confinement a misdemeanor (as of the time of Wooley's offense), and thus, punishable under Section 26-52, Ordinance Code of the City of Jacksonville. The petition alleged that petitioner had not been represented by counsel, had no funds with which to retain counsel, and had not been informed of his right to counsel. The petition further alleged that the failure to provide counsel violated petitioner's right to counsel under the Sixth and Fourteenth Amendments to the United States Constitution and constituted grounds for setting aside the judgments of conviction for the offenses to which he had pled guilty.

On January 2, 1970, the United States District Court entered an order to show cause.

On January 16, 1970, a response to the order to show cause was filed by the respondent-petitioner outlining the lack of merit in the petition for habeas corpus.

On January 28, 1970, the United States District Court entered its order vacating the judgments of conviction entered in the Municipal Court and granting the respondent-petitioner fourteen days in which to rearraign and retry the petitioner-respondent, provided that petitioner was guaranteed his right to counsel in the absence of waiver, and providing that the petitioner be released if proceedings were not conducted in accordance with the order. The Court held that

"A misdemeanant in a municipal court has a right to

> counsel, in the absence of waiver, where the *potential* penalty, which may be imposed upon him as a result of convictions in all then-pending charges totals 90 days incarceration or a $500.00 fine." (Emphasis by Court)

On February 4, 1970, a motion for rehearing was filed by the respondent-petitioner pointing out that the petition for habeas corpus, order to show cause, and the order vacating the judgments of conviction designated as respondents, the Consolidated City of Jacksonville and Duval County, State of Florida, whereas the law requires that habeas corpus relief be directed against the actual human custodian, not the state or governmental entity.

The motion further pointed out that the custody of the petitioner was not pursuant to a judgment of a State court and that the order vacating the judgments of conviction was predicated upon a hybrid opinion of the Court in *James v. Headley*, 410 F.2d 325 (5th Cir. 1969), which is in direct conflict with the holding in *Beck v. Winters*, 407 F.2d, 125 (5th Cir. 1969).

On February 11, 1970, the United States District Court entered its order denying the motion for rehearing.

On February 16, 1970, the respondent-petitioner filed a motion for certificate of probable cause and stay order, with memorandum in support of the motion filed simultaneously.

On February 19, 1970, the United States District Court entered its order denying the motion for stay order and refusing to rule on the motion for certificate of probable cause.

On February 25, 1970, the respondent-petitioner filed its notice of appeal.

On February 27, 1970, the United States District Court amended its order of January 28, 1970, appearing in 308 F. Supp. 1194 at page 1197, to read:

> "To make the holding of this Court clear once again: A defendant in a municipal court has a right to counsel, in the absence of waiver, where the *potential* penalty which may be imposed upon him as a result of convictions in all then-pending charges totals 90 days incarceration or a $500.00 fine." (Emphasis by Court)

On April 29, 1970, by order of the United States District Court, counsel was appointed to represent the petitioner-appellee on appeal.

On October 27, 1970, the United States Court of Appeals for the Fifth Circuit entered its order affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

The lower court has decided an important question of constitutional law involving the scope of the right to court-appointed counsel which this Court has not yet settled, but of necessity should be settled because of conflicting and confusing rules throughout the entire nation.

Specifically, the Fifth Circuit Court of Appeals, in affirming the decision of the District Court for the Middle District of Florida, has held that a defendant in a municipal court has a right to court-appointed counsel where the potential penalty which may be imposed as a result of convictions on all then-pending charges totals ninety days confinement or a $500.00 fine.

Thus, under the holding of the lower court, a person charged with an offense which carries no potential confinement but only a potential fine of $500.00 or more has a right to court-appointed counsel.

This decision is of such far-reaching impact in its consequences to both bench and bar and to all persons that it is of paramount importance that the question be finally determined by the Supreme Court of the United States.

Moreover, the decision of the Fifth Circuit Court of Appeals is in direct conflict with the decision of the Eighth Circuit Court of Appeals in *Beck v. Winters*, 407 F.2d 125 (8th Cir. 1969), cert. denied 395 U.S. 963, 89 S.Ct. 2104, 23 L.Ed. 2d 749 (1969), which affirmed *Winters v. Beck*, 281 F.Supp. 793 (E.D. Ark. W.D. 1968), and adopted the well recognized rule regarding right to counsel followed in *Brinson v. State*, 273 F.Supp. 840 (S.D. Fla. 1967), that the right to counsel depends on the seriousness of the charge and that the minimum offense for which counsel must be appointed is one which carries a potential penalty of more than six months imprisonment including jail time for failure to pay any part of a fine.

It is respectfully submitted that the lower court, in reaching its decision, mistakenly relied on *James v. Headley*, 410 F.2d 325 (5th Cir. 1969), and *Harvey v. Mississippi*, 340 F.2d 263 (5th Cir. 1965).

While *James v. Headley*, supra, contains broad and liberal language regarding the right to counsel, a careful analysis of the case reveals that the opinion is broken into three parts with parts I and II relating to right to counsel and part III relating to the utilization of an injunctive class suit as a habeas corpus application. As specifically stated by Judge Wisdom

at page 327 of the opinion:

> "All concur in reversal. My brother judges *do not join in parts I and II* of the opinion." (Emphasis supplied.)

Thus, parts I and II of *Headley*, supra, are solely the opinion of Judge Wisdom, having no real legal effect.

Moreover, the potential penalty to which the accused was subjected in *Headley*, supra, was 600 and 240 days, respectively, bringing the case within the "serious offense" classification. Thus, the actual law of the case in *Headley*, supra, is within the recognized "six months" rule followed in *Beck v. Winters*, supra, and is much narrower than the opinion of Judge Wisdom found in parts I and II of the decision.

James v. Headley, supra, is the only case relied on by the District Court which involved a defendant in municipal court. However, both the District Court and the Court of Appeals apparently relied heavily on *Harvey v. Mississippi*, supra. The Court of Appeals, in affirming the lower court, specifically cited *Harvey* as supporting the holding of the District Court, and it is respectfully submitted that the Courts' reliance on Harvey, supra, was misplaced.

In *Harvey*, supra, the defendant was convicted in a rather informal proceeding before a Justice of the Peace after pleading guilty to possession of whiskey and received the maximum penalty of ninety days and $500.00. While the Court in *Harvey*, supra, adopts rather broad language regarding the right to counsel in quoting with approval at page 271, of its opinion from *Evans v. Rives*, 75 U.S. App. D.C. 342, 126 F.2d 633 (1942), it is essential to note that *none* of the cases cited in support of the Court's decision involved a potential penalty of less than six months incarceration. Both, *White v. State of Maryland*, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193

(1963), and *Hamilton v. Alabama*, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961), involved death penalties, and even *Evans v. Rives*, supra, involved a sentence of one year imprisonment.

It is suggested that the Court in *Harvey*, supra, did not base its decision on the potential penalty involved but on the unusual circumstances that surrounded Harvey's conviction and that the holding of the Court is so limited. First, Harvey could neither read nor write. Secondly, the proceedings before the Justice of the Peace were very informal, and the Judge indicated to Harvey, prior to his guilty plea, that only a fine would be imposed. Thirdly, Harvey was under the mistaken belief that he was pleading guilty to possession of beer which would have carried a lesser sentence than possession of whiskey.

In any event, *Harvey* does not follow the generally accepted six months rule regarding the right to counsel, and it is urged that *Harvey* is restricted to the facts of the case.

Even assuming arguendo that the *Harvey* decision was based on the potential penalty involved, the potential maximum sentence which could have been imposed on Harvey, and the one which was imposed, was ninety days *and* $500.00, whereas in the present case, the court below has held that the right to counsel extends to cases where the potential penalty which may be imposed on all pending charges could amount to ninety days imprisonment *or* a fine of $500.00.

Thus, the lower court has held that the right to court-appointed counsel extends to all cases where the potential penalty upon conviction could amount to a $500.00 fine. No other case has gone so far. All other cases have held that the defendant must be subjected to possible confinement before he is entitled to court-appointed counsel, and, as previ-

ously shown, the rule widely followed by the courts is that the potential minimum confinement be more than six months in duration before the right to court-appointed counsel exists.

As the Court aptly pointed out in *Brinson*, supra, at page 846:

> "The right to counsel guaranteed by the Sixth and Fourteenth Amendments is not an absolute right, nor are any of the rights guaranteed by the Constitution 'absolute.' See, Creighton v. State of North Carolina, 257 F.Supp. 806 (E.D.N.C. 1966). As stated in that case, the Constitution was not written to provide an exercise in abstract idealism but as a practical guide for the management of the affairs of this country and the protection of the rights of its citizens. In today's complex society there can be no truly 'absolute' rights. * * * . . . the 'absolute right' to counsel in all criminal prosecutions must be qualified by practical exigencies and, unless this is done, the necessities of sound judicial administration would be disregarded and the administration of justice thrown into senseless chaos."

The Fifth Circuit Court, prior to its decision in the present case, recognized the near impossibility of providing counsel in municipal court when it said in *McDonald v. Moore*, 353 F.2d 106 (5th Cir. 1965), at page 108:

> "It seems unlikely that a person in municipal court charged with being drunk and disorderly, would be entitled to the services of an attorney at the expense of the state or municipality. Still less likely is it that a person given a ticket for a traffic violation would have the right to counsel at the expense of the state. If the Constitution requires that counsel be provided in such cases it would seem that in many urban areas

there would be a requirement for more lawyers than could be made available. Even with the assistance of law students, whose services may be requested under some of the criminal justice plans, the demand might come near exceeding the supply."

It is interesting to note that the Court in *McDonald*, supra, at page 109, specifically noticed that in the City of Jacksonville, as of 1965, there were over 1,100 persons charged in municipal court during an average week with non-felony offenses, of which less than 60% were for traffic violations. In 1965, there were less than 600 active members of the Jacksonville Bar.

One of the most exhaustive reviews of the right to counsel is found in the recent case of *Hendrix v. City of Seattle*, 456 P. 696 (1969), cert. denied 90 S.Ct. 969, 397 U.S. 948, 25 L.Ed.2d 129 (1970), wherein the Court cites repeated refusals by this Court to review decisions by state courts which expressly refused to appoint counsel in state court misdemeanor cases.

The opinion points out that while a denial of certiorari by the United States Supreme Court does not "amount to a declaration, modification or repudiation of a rule, it is not totally without significance especially where dissenting opinions highlight the refusal." *Hendrix*, supra, at page 700. As pointed out by the Court in *Hendrix*, supra, those cases put the issue of whether counsel must be appointed in misdemeanor cases squarely before the court and the denial of certiorari by the United States Supreme Court, following so closely its decision in *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), resolved some of the ambiguity said to exist in *Gideon*, supra, and indicated that

the right to court-appointed counsel did not extend to misdemeanor cases.

Furthermore, as suggested by the Court in *Hendrix*, supra, this Court's use of the term "felony" in *Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967), when clarifying the meaning of *Gideon*, supra, and stating that the *Gideon* case held that there was an absolute right to counsel in "felony cases" indicates that the right to court-appointed counsel is restricted to felony cases or, at least, cases involving serious offenses.

It is respectfully submitted that in light of the language contained in *Hendrix*, supra, this Court's denial of certiorari in *Hendrix v. City of Seattle*, 397 U.S. 948, 90 S.Ct. 969, 25 L.Ed. 2d 129 (1970), is highly significant.

Of still greater significance is this Court's denial of certiorari in *Beck v. Winters*, supra, 395 U.S. 963, 89 S.Ct. 2104, 23 L.Ed. 2d 749 (1969), inasmuch as *Beck* affirmed the generally accepted rule that counsel must be appointed only where the potential penalty which may be imposed amounts to more than six months imprisonment.

It is suggested that while the right to court-appointed counsel may not be confined to an arbitrary felony-misdemeanor classification, the right is limited to offenses which potentially subject the defendant to "serious consequences" if convicted and the courts have generally interpreted a serious offense to be one which carries with it a potential sentence of more than six months confinement upon conviction.

Thus, the lower court has strayed from the six months test which is widely applied by the courts in determining whether the right to counsel exists.

Certainly, no case has held that a fine alone necessitates the appointment of counsel.

Further proof of the state of flux concerning the rule governing the limitations of the right to counsel is found in a recent decision of the United States District Court for the Southern District of Florida. As outlined above, other circuits and jurisdictions throughout the nation are relying upon the six months imprisonment potential rule. However, even within the confines of the jurisdiction of the United States Court of Appeals for the Fifth Circuit, the rule has been extended to require counsel, regardless of the potential penalty involved. The recent decision of *Patterson* v. *Purdy*, Case No. 69-957-Civ-JE, rendered by Honorable Joe Eaton, United States District Judge, Southern District of Florida, on October 1, 1970 (not yet officially reported), appearing as Appendix "I" attached hereto, specifically concludes that the petitioner's exposure to jail, regardless of the "serious" nature of the offense, is sufficient to require counsel for violation of a county ordinance. The Court therein specifically stated at page 4: (App. 23)

> "Therefore, I do not believe that the right to counsel may be conditioned upon the number of days a person might spend in jail."

The confusion now existing both circuitwise and nationwide, because of conflicting application of the Sixth and the Fourteenth Amendments to the United States Constitution, of necessity require this Court to reconcile the conflicts and establish once and for all a uniform application of the proper limitations of the constitutional right to counsel. The time has come, and the need never greater.

Finally, it is respectfully submitted that the lower court erred in overlooking the patent jurisdictional factor that mu-

nicipal courts are not state courts pursuant to which habeas corpus jurisdiction attaches in the federal court system by operation of 28 U.S.C. Section 2254, and in overlooking the fact that the law requires that the right to relief in habeas corpus proceedings be directed against the actual human custodian, whereas in the present case the petition was directed against the municipality. See *U. S. ex rel. Elliott v. Hendricks*, 213 F.2d 922, 926 (3d Cir. 1954), cert. denied 348 U.S. 851, 75 S.Ct. 77, 99 L.Ed. 670 (1954).

As can be readily seen from the foregoing, the constitutional question raised by the decision below is of great public interest and should be finally determined by this Honorable Court.

Moreover, the clear conflict between the holding of the Eighth Circuit Court in *Beck v. Winters*, supra, and the Fifth Circuit Court in the present case makes a final decision by this Court of even greater necessity if the lower courts, members of the legal profession, law enforcement agencies, and all persons are to have the benefit of a uniform rule regarding the right to counsel.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for writ of certiorari should be granted to review the decision of the United States Court of Appeals.

Respectfully submitted,

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APPENDIX A

(308 F.Supp. 1194 (1970))

Jewel Bertram WOOLEY, Jr., Petitioner

v.

CONSOLIDATED CITY OF JACKSONVILLE and Duval County, State of Florida, Respondents.

No. 70--2--Civ--J.
United States District Court, M. D. Florida, Jacksonville Division.
Jan. 28, 1970.

State prisoner brought federal habeas corpus proceeding. The District Court, Scott, J., held that a defendant in a municipal court has a right to counsel, in absence of waiver, where the potential penalty which may be imposed upon him as a result of convictions in all then pending charges totals 90 days' incarceration or a $500 fine.

Order in accordance with opinion.

1. Criminal Law – 641.2

A defendant in a municipal court has a right to counsel, in absence of waiver, where the potential penalty which may be imposed upon him as a result of convictions in all then-pending charges totals 90 days incarceration or a $500 fine. 28 U.S.C.A. § 2241.

2. Habeas Corpus – 45.3(7)

Because of steadfast refusal of Florida courts to follow pronouncements of United States Court of Appeals for Fifth Circuit regarding the right of accused persons to have the assistance of counsel, petitioners really have no available state court remedy, and therefore federal court in habeas corpus

proceeding may accept jurisdiction without requiring exhaustion of state court remedies. 28 U.S.C.A. §§ 2241, 2254.

3. Habeas Corpus – 45.3(1)

Exhaustion of state court remedies before bringing habeas corpus proceeding in federal court is a matter of comity and not jurisdiction. 28 U.S.C.A. §§ 2241, 2254.

4. Habeas Corpus – 45(3)

A municipal court is a "state court" in sense that federal habeas corpus proceeding may be brought by one illegally sentenced by municipal court. 28 U.S. C.A. § 2241.

See publication Words and Phrases for other judicial constructions and definitions.

5. Habeas Corpus – 45.2(1)

It is wrongful detention with which federal habeas corpus remedy is concerned, and not court which imposed it, or what particular type of charge was involved. 28 U.S.C.A. § 2241.

Jewell Bertram Wooley, Jr., pro se.

James C. Rinaman, Jr., Gen. Counsel, David U. Tumin, Asst. Counsel, Consolidated City of Jacksonville, Jacksonville, Fla., for respondents.

ORDER

SCOTT, District Judge.

On January 2, 1970, this Court issued an order to respondents to show cause why relief should not be granted in the above entitled case. The Court has now received the reply of respondents and has reviewed and considered the entire file.

The facts are undisputed. Petitioner is held by respondents pursuant to a conviction for violation of Section 26–7, Ordi-

nance Code of the City of Jacksonville (disorderly conduct), as well as a conviction for violation of Section 944.40 of the Florida Statutes, F.S.A. (escape from a municipal jail). Section 26–62, Ordinance Code of the City of Jacksonville, makes a violation of Section 944.40 of the Florida Statutes, F.S.A. also a municipal offense.

Petitioner alleges that he pled guilty in the Municipal Court of the City of Jacksonville, Florida, to the above mentioned charges and received sentences on these respective charges totaling 90 days incarceration. Petitioner further alleges that he was not advised of the right to counsel and that he was not told that counsel would be provided for him in the event of his indigency; neither did he waive the right to counsel. These allegations are uncontested in the reply of respondents and, therefore, the Court may accept them as true.

[1] For a number of years the United States Court of Appeals for the Fifth Circuit has held that the right to counsel announced in Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) applies to non-felons under certain circumstances. Bolar v. Purdy, 412 F.2d 321 (5th Cir. 1969) (two offenses punishable by 90 days and $750.00; James v. Headley, 410 F.2d 325 (5th Cir. 1965) (defendants charged in municipal court with a number of petty offenses each punishable by 60 days, but potentially subjecting defendants to total sentence of 660 and 240 days respectively); Colon v. Hendry, 408 F.2d 864 (5th Cir. 1969) (sentence totaling 15 months or $850.00 for three misdemeanors); McDonald v. Moore, 353 F.2d 106 (5th Cir. 1965) (sentence of six months and $250.00 fines on each of two misdemeanor charges); Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965) (misdemeanor punishable by up to $500.00 fine and up to 90 days in jail). *See also* Steadman v. Duff, 302 F.Supp. 313 (M.D.Fla., 1969); Bramlett v. Peterson, et al., 307 F.Supp. 1311 (M.D.Fla.,

1969); Gordon v. Carson, Case No. 69–702–Civ–J (M.D.Fla., 12 22 69); Mitchell v. Wainwright, 308 F.Supp. 436 (M.D. Fla., 1969). It is the belief of this Court that these cases establish the principle that the right to counsel exists where the *total potential* penalty which may be imposed on an alleged violator as a result of *all pending charges* is 90 days or a $500.00 fine.

[2] Counsel for respondents argues several jurisdictional points. He first contends that since petitioner has not exhausted his state court remedies, this Court should not accept jurisdiction. However, because of the steadfast refusal of the Florida courts to follow the pronouncements of the United States Court of Appeals for the Fifth Circuit, the recent case of Steadman v. Duff, *supra*, noted that petitioners really have no *available* state court remedy and, therefore, the federal court may accept jurisdiction without requiring exhaustion. In this regard, *see* Colon v. Hendry, *supra*, 408 F.2d at 865, discussing "an impasse existing between (that) court and the Supreme Court of Florida over the right to counsel". *See also* Watkins v. Morris, 179 So.2d 348 (Fla. 1965); State ex rel. Taylor v. Warden, 193 So.2d 606 (Fla. 1967); Brinson v. Purdy, 201 So.2d 260 (3rd D.C.A.Fla. 1967); Fish v. State, 159 So.2d 866 (Fla. 1964). The Fifth Circuit recently remanded a municipal court case, Boyer v. City of Orlando, 402 F.2d 966 (5th Cir. 1969), so that the Florida courts might again consider their position with regard to counsel in municipal courts. However, this Court has no assurance that the Florida courts will be more inclined to comply with the Fifth Circuit's rulings now than they have been in the past. Therefore, this Court will not require further exhaustion of state remedies as a prerequisite to accepting jurisdiction in this case.

Secondly, the respondents argue that a municipal court is

not a "state court" within the meaning of 28 U.S.C. § 2254 and, therefore, this Court has no jurisdiction. That position is untenable for several reasons.

In Rowe v. Peyton, 383 F.2d 709 (4th Cir. 1967), affirmed 391 U.S. 54, 88 S.Ct. 1549, 20 L.Ed.2d 420 (1968), regarding the origins and purpose of the habeas remedy, it was said:

"The writ of habeas corpus is not the creature of a legislature. It was a device fashioned by the common law courts to protect and extend their own jurisdiction.

"In the Seventeenth Century it developed into the 'Great Writ' so prized in Colonial America. In the process, it was assisted by the Petition of Right, enacted by the Parliament in 1728 to extend the writ to bring into question commitments under orders of the Crown, and it received procedural assistance in its codification in the Habeas Corpus Act of 1679, but the writ was essentially the product of judicial innovation.

"In the country, in Article I Section 9 of the Constitution, it was provided that the privilege of the writ shall not be suspended except when required by the public safety in times of rebellion or invasion. The Judiciary Act of 1789 authorized the federal courts to grant such writs, but the nature and scope of the writ was to be found neither in Article I of the Constitution nor in the Judiciary Act of 1789.

"Until 1867 the writ was available in a federal court only to question federal detention. Occasions for its use were infrequent, and in most instances it was employed to question detention of individuals by the military authority acting under executive orders.

"By the Act of February 5, 1867 the federal writ was extended to procure the release of persons held in state custody in violation of the Constitution, laws or treaties of the United

States. That statutory authorization, now embodied in 28 U.S.C.A. § 2241, was, unquestionably, a congressional extension of the federal writ to reach cases of state custody, but it was not immediately recognized as having expanded the scope of the writ or altered its other procedural requirements.

"Thus, it was held in Ex parte Parks, [93 U.S. 18, 23 L.Ed. 787] just as it had been held earlier in Ex parte Watkins, [28 U.S. (3 Pet.) 193, 7 L.Ed. 650] that a prisoner serving a sentence imposed by a court of competent jurisdiction has no recourse to habeas corpus. Ex parte Parks was concerned with a federal prisoner, but the scope of the writ was the same whether the petitioner was a state or a federal prisoner. This is clear from the statute.

"In the remainder of the Nineteenth Century there was little advance from that level, except that certain major defects were treated as jurisdictional.

"The great flowering of the writ was a mid-Twentieth Century phenomenon starting tentatively with Frank v. Mangum [237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969] budding in Brown v. Allen [344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469] and blossoming with Fay v. Noia [372 U.S. 391, 83 S.Ct. 822, 9 L.Ed. 2d 837]. Those tremendous developments of the writ were entirely judicial, not legislative, and if they owe some debt to a permissive construction of the Act of 1867, it was a construction discoverable only by Twentieth Century judges.

"When the writ as it is known today, therefore, is almost entirely the product of judicial innovation and adaptation to fit it to new situations and newly felt needs, judges should not hesitate to take a further step to adapt it to meet yet another need which is present, urgent, and recognized, even by the state.

"We need not speculate about the matter, however; the Supreme Court has declared that habeas corpus 'is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose.' The statement is historically accurate, and it epitomizes the governing principle of our decision".

[3] Turning aside from the question of judicial and legislative involvement in the development of the "Great Writ", at least one authority for vesting power in the federal courts to grant writs of habeas corpus is 28 U.S.C. § 2241. That section grants power to the federal courts to issue writs of habeas corpus when a petitioner is "* * * in custody in violation of the Constitution or laws or treaties of the United States". 28 U.S.C. § 2254, relied upon by the respondents, is basically a codification of the comity principle of exhaustion of state court remedies developed by the federal case law. Exhaustion is a matter of comity, and not jurisdiction. *See, e. g.*, Williams v. Coiner, 392 F.2d 210 (5th Cir. 1968); Pate v. Holman, 343 F.2d 546 (5th Cir. 1965); United States ex rel. Rush v. York, 281 F.Supp. 779 (D.Conn. 1967). *See also*, R. SOKOL, FEDERAL HABEAS CORPUS §§ 22.1, 22.2 (1969).

[4] Moreover, while it may be that municipal courts are not "state courts" in the traditional usage of those words, it is clear that municipal governments, including municipal courts, exist as a result of enabling legislation from state governments. In that sense, they are "state courts". *See* Article 5, Section 1, and Article 8, Constitution of the State of Florida, F.S.A.; Chapter 67–1320, as amended, Laws of 1967 (Article 13–Judiciary, Chapter 2–Municipal Courts). To hold otherwise would be to deny habeas relief simply because the offense charged and the court were local in nature.

[5] The respondents also point to dictum in the *McDonald* opinion, *supra*, to the effect that it is not likely that right to counsel will be extended to municipal courts, or provided for offenses such as traffic violations. This Court at this time will not follow that reasoning. It is wrongful detention with which the habeas corpus remedy is concerned, and not the court which imposed it, or what particular type of charge was involved.

This Court appreciates and understands the contentions of the respondents that the application of the right to counsel to municipal courts will present great operational difficulties for those courts. It is not the intent of this Court to frustrate the work of the local courts; they are instruments through which great justice can be and is rendered. However, it has been said time and time again that the right to counsel is the right through which all of the other rights become meaningful. This is no less true in municipal courts than it is in other state or federal courts. *See* Stevenson v. Holzman, 458 P.2d 414 (Or.Sup.Ct.1969). Moreover, the United States Court of Appeals for the Fifth Circuit has spoken too often and too loudly for this Court to deny relief in this case.

To make the holding of this Court clear once again: A defendant in a municipal court has a right to counsel, in the absence of waiver, where the *potential* penalty which may be imposed upon him as a result of convictions in all then-pending charges totals 90 days incarceration or a $500.00 fine.

Therefore, it is

Ordered:

1. The judgments of conviction entered in the Municipal Court of the City of Jacksonville, Florida, against the petitioner for violation of Ordinance 26–7 (disorderly conduct)

and Ordinance 26–52 (escape from a municipal jail), together with the sentences imposed thereunder, are hereby vacated.

2. The respondents are granted a period of fourteen (14) days from the date of this order within which to rearraign and retry the petitioner on the original charges; provided, however, that before doing so the respondents shall guarantee the petitioner his constitutional right to counsel in the absence of waiver. If Proceedings are not conducted in accordance with the preceding sentence of this paragraph 2, the petitioner must be released from custody.

APPENDIX B

(Received Legal Division, Oct. 23, 1970,
City of Jacksonville, Florida)

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 29583
Summary Calendar*

JEWEL BERTRAM WOOLEY, JR.,
Petitioner-Appellee,

versus

CONSOLIDATED CITY OF JACKSONVILLE and DUVAL COUNTY, STATE OF FLORIDA,
Respondents-Appellants.

Appeal from the United States District Court for the Middle District of Florida

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(October 27, 1970)

Before WISDOM, COLEMAN, and SIMPSON, Circuit Judges.

PER CURIAM: In this case the District Court held that a defendant in a municipal court, in the absence of waiver,

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*Rule 18, 5th Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5th Cir. 1970, ... F.2d ....., Part I [No. 29,278, August 14, 1970].

has a right to counsel if the potential penalty in all pending charges could amount to as much as imprisonment for 90 days or a fine of $500.

The decision of the District Court is reported, 308 F. Supp. 1194 (M.D., Fla., 1970). We agree with the District Court that a prisoner in the custody of municipal authorities may, in proper cases, have the benefit of the writ of habeas corpus. We consider it of no moment that the pro se petitioner did not correctly style his case.

We further agree that this petitioner-appellee was entitled to the benefit of the decision rendered in *Harvey v. Mississippi*, 5 Cir., 1965, 340 F.2d 263.

The judgment of the District Court is

AFFIRMED.

APPENDIX C

FOURTEENTH AMENDMENT. UNITED STATES CONSTITUTION

"AMENDMENT XIV.—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

"Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

"Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote in any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

"Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

"Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

APPENDIX D

SIXTH AMENDMENT. UNITED STATES CONSTITUTION

"AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

APPENDIX E

28 U.S.C. SECTION 2254

"§ 2254. State custody; remedies in State Courts

An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented. June 25, 1948, c. 646, 62 Stat. 967."

APPENDIX F

SECTION 944.40, FLORIDA STATUTES, 1967

944.40 Escapes; penalty.—Any prisoner confined in any prison, jail, road camp, or other penal institution, state, county or municipal, or in working upon the public roads or being transported to or from a place of confinement, who escapes or attempts to escape from such confinement, if the charge or conviction under which said prisoner is incarcerated constitutes a felony under the laws of the jurisdiction which has caused his incarceration he shall be guilty of a felony and upon conviction thereof shall be punishable by imprisonment of not more than 10 years; or if the charge or conviction under which said prisoner is incarcerated constitutes a misdemeanor, he shall be guilty of a misdemeanor and upon conviction thereof shall be punished by imprisonment of not more than 90 days. The punishment of imprisonment imposed under this section shall run consecutive to any former sentence imposed upon any prisoner convicted hereunder.

APPENDIX G

SECTION 26-7
ORDINANCE CODE OF THE FORMER CITY OF JACKSONVILLE

"Sec. 26-7. Disorderly conduct.

"It shall be unlawful and a class D offense for any person to disturb or endanger the public peace or decency by any disorderly conduct.

"The following acts, among others, are declared to be disorderly conduct:

(1) Use of obscene, abusive or profane language.

(2) Making of any threats of violence to or against any other person.

(3) Being drunk, or the extravagant use of spirituous liquors.

(4) Being noisy and disorderly in or upon any street or other public place in the city.

(5) The fast driving of any vehicle through the streets of the city.

(6) Making any indecent exposure of the person.

(7) The reckless and dangerous use of slingshots.

(8) Any noisy or riotous conduct to the disturbance of the public peace and tranquility.

(9) Engaging in, promoting, encouraging, aiding or abetting any fight, riot or noisy and disorderly proceed-

ing on any street or public place, or in any private building or dwelling when persons residing in the vicinity are disturbed.

(10) Assault and battery upon any person on any street or public place, or in any private building or dwelling, when persons residing in the vicinity are disturbed.

(Code 1942, ch. 33, §§ 3, 16, 19; ch. 13, § 3; Code 1953, § 27-9)"

APPENDIX H

SECTION 26-52
ORDINANCE CODE OF THE FORMER CITY OF JACKSONVILLE

"Sec. 26-52. State Misdemeanors.

"It shall be unlawful to commit, within the limits of the city, any act which is or shall be recognized by the laws of the State of Florida as a misdemeanor.

"Any person violating the provisions of this section shall, upon conviction thereof, be punished by the same penalty as is therefore provided by the laws of the State of Florida, but in no case shall such penalty exceed the penalty provided for class D offenses. (Code 1942, ch. 33, § 1; Code 1953, § 27-43)"

APPENDIX I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 69-957-Civ-JE

(Filed October 1, 1970)
(Received Legal Division October 9, 1970,
City of Jacksonville, Florida)

BETTY PEARL PATTERSON, Petitioner,

-v-

E. WILSON PURDY, etc., Respondent.

ORDER

The Petitioner, Betty Pearl Patterson, filed a Petition for Writ of Habeas Corpus in this Court on August 12, 1969. The petitioner alleged that she had been adjudicated guilty of driving an automobile without a valid operator's license by the Metropolitan Court of Dade County, Florida, on August 11, 1969, and sentenced to 15 days incarceration, a $250.00 fine, $6.00 court costs or an additional 17 days imprisonment in lieu of payment of fine and costs.

On August 12, 1969, this Court ordered the petitioner released on her own recognizance pending final determination of the issues presented by the petition.

At the time this action was brought, Florida did not recognize the right to counsel in non-felony cases. *Watkins v. Morris*, 179 So.2d 345 (Fla. 1965) and *Taylor v. Orange County Prison Farm*, 201 So.2d 899 (Fla. 1967).

Recently the Florida Supreme Court extended the guarantee of counsel to the trial of misdemeanors which carry a maxi-

mum penalty in excess of six months imprisonment and a $500.00 fine. *Argersinger v. Hamlin*, 236 So.2d 442 (Fla. June 3, 1970). Since the maximum penalty to which this petitioner was exposed does not exceed that required in *Argersinger*, it is clear that exhaustion of state remedies would be futile.

Counsel for the petitioner and the respondent have filed with the Court a Stipulation of Fact. Based on that Stipulation, the Court finds as follows:

FINDINGS OF FACT

1. The petitioner, Betty Pearl Patterson, was convicted on August 11, 1969, of driving a motor vehicle in Dade County, Florida without a valid operator's license in violation of Section 30-13 of the Metropolitan Dade County Code. She was sentenced to 15 days incarceration, a $250.00 fine plus $6.00 court costs or an additional 17 days in lieu of non-payment of the fine and costs.

2. Petitioner entered a plea of guilty. She did not have the benefit of counsel, nor was she advised that she was entitled to counsel, nor was she advised that counsel would be appointed if she could not afford one.

3. The petitioner was at the time of her trial unable to afford counsel of her own choice.

CONCLUSIONS OF LAW

The Court has jurisdiction in this cause and the petitioner is presently in the "custody" of the respondent.

The penalty imposed by the Metropolitan Court of Dade County, Florida, was authorized by Section 30-47 of the Metropolitan Dade County Code. That section provides that the maximum punishment shall not exceed 30 days imprison-

ment, a $250.00 fine, or both in the discretion of the judge. According to Rule 18 of the Rules of Practice and Procedure in the Metropolitan Court, imprisonment for non-payment of a fine was to be computed at the rate of $15.00 per day.[1]

Notwithstanding the June 29, 1970 decision of the United States Supreme Court in *Williams v. Illinois*, ... U.S. ....., 26 L.Ed.2 586, 90 S.Ct. ....., the state trial court applied its local rule regarding an alternative jail sentence for non-payment of fine. However, whether this petitioner was exposed at trial time to a 30-day sentence or to a 47-day sentence plays no part in this Court's determination of the matter before it.

If federal relief is to be afforded in this case it must be because the Constitution of the United States commands it.

The Fourteenth Amendment to the Constitution provides that no person shall be deprived of his liberty "without due process of law." The Supreme Court of the United States has held that the Sixth Amendment right to counsel is an essential element of due process of law and applies to the states. *Gideon v. Wainwright*, 372 U.S. 335 (1963). Therefore, the denial of counsel deprived petitioner of rights guaranteed by the Sixth and Fourteenth Amendments. Her conviction must be set aside and she must be granted a new trial.

Although no case in this Circuit has extended the right to

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1. Rule 18, Rules of Practice and Procedure Metropolitan Court in and for Dade County, Florida.

SERVING A SENTENCE IN LIEU OF FINES AND COURT COSTS

In the event the sentence of the Court provides for imposition of a fine and/or costs and the defendant fails to comply, the alternative jail sentence shall be the equivalent of fifteen ($15.00) dollars per day or portion thereof. (amended and effective July 1, 1969).

counsel to prosecutions that carried a total potential penalty (considering the aggregate of the maximum penalties under each charge) of less than ninety days, no case has established that there is a ninety day "dividing line" that establishes the limits of the constitutional right to counsel in criminal prosecutions. *Harvey v. Mississippi*, 340 F.2d 263 (5th Cir. 1965); *McDonald v. Moore*, 353 F.2d 106 (5th Cir. 1965); *James v. Headley*, 410 F.2d 325 (5th Cir. 1969); *Bohr v. Purdy*, 412 F.2d 321 (5th Cir. 1969); *Shepherd v. Jordan*, 425 F.2d 1174 (5th Cir. 1970).

The decision in this case is not predicated upon the conclusion that the petitioner's exposure to jail is "serious" enough to entitle her to counsel. This Court's view is that any deprivation of liberty without counsel runs afoul of the Constitution. Compare, *Argersinger v. Hamlin*, *supra* at 444 (dissenting opinion of Justice Boyd) and *James v. Headley*, *supra*.

The Constitution does not say that a party may be deprived of his liberty for a "reasonable period of time" without due process of law. The Fourteenth Amendment states unequivocally . . . Nor shall any state deprive any person of life, liberty, or property without due process of law . . ." Therefore, I do not believe that the right to counsel may be conditioned upon the number of days a person might spend in jail.

Although the Court fully recognizes the practical problems involved in giving full vitality to the right to counsel, to do otherwise would be to attempt to draft a rule of judicial administration. I do not believe that this Court has the authority to formulate an ex cathedra rule to alleviate the impact of a constitutional guarantee.

Therefore, unless the petitioner is within a reasonable period of time accorded a new trial consistent with the Sixth and Fourteenth Amendments to the Constitution of the United

States, this Court will be obliged to order her release from the custody of the respondent.

DONE and ORDERED at Miami, Southern District of Florida, this 1st day of October, 1970.

United States District Judge

s/ JOE EATON

cc: Bruce S. Rogow, Esq.
Jack R. Blumenfeld, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for a Writ of Certiorari and Appendices has been furnished to Samuel S. Jacobson, Esquire, First Bank & Trust Building, Jacksonville, Florida 32202, attorney for respondent, and to Robert W. Elrod, Esquire, attorney for amicus curiae, 25 South 2nd Street, Jacksonville Beach, Florida, by United States mail, this _____ day of December, 1970.

_____

Attorney